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No. 84-1944

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In The
Supreme Court of the United States
October Term, 1984

—o—

UNITED STATES OF AMERICA, ET AL.,
Appellants,
v.
ALVIN HEMME, ET AL.,
Appellees.

—o—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

—o—

JURISDICTIONAL STATEMENT OF ALVIN HEMME, ET AL.

—o—

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW AND ADDITIONAL QUESTION PRESENTED FOR REVIEW

Appellees respectfully disagree with the appellant's statement of the question presented for review and present an additional question for review. The first question presented below is a more factually accurate statement which will emerge from examination of the record below. The second question presented was also raised in the court below.

1. Where a decedent made gifts on September 28, 1976 and elected to apply the $30,000 specific exemption against the same, can a reduction of $6,000 in the unified credit pursuant to Internal Revenue Code Section 2010(c) which was amended on October 4, 1976 (when the President signed it into law), constitutionally be made when the same gifts were included in the decedent's gross estate as transfers made in contemplation of death pursuant to Section 2035, as amended?

2. Whether the word "gift" is used in Internal Revenue Code, Section 2010(c) includes a "transfer" as used in Internal Revenue Code, Section 2035?

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Appellants,[1]

v.

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JURISDICTIONAL STATEMENT OF ALVIN HEMME ET AL.

OPINION BELOW

The order of the district court (Appellant's Jurisdictional Statement, Appendix A, pp. 1a-6a) is unreported.

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[1]Appellants are: United States of America, Department of the Treasury of The United States of America and Commissioner of Internal Revenue.

[2]Appellees are Alvin Hemme, Dennis Hemme, Ron Hemme and Farmers and Merchants Bank of Highland, a corporation, as Trustee of the Revocable Living Trust of Charles W. Hirschi.

JURISDICTION

The judgment of the district court (Appellant's Jurisdictional Statement, Appendix B, p. 7) was entered on January 23, 1985. The Appellant, The United States of America, filed a notice of appeal (Appellant's Jurisdictional Statement, Appendix C, p. 8a) on February 21, 1985. On April 16, 1985 Justice Stevens extended the time for docketing the appeal to and including June 21, 1985. Appellant invoked the jurisdiction of this court under 28 U.S.C. 1252, under which a direct appeal lies, where, as here, a federal statute has been held unconstitutional as applied. *United States v. Darusmont,* 449 U.S. 292, 293 (1981) (per curiam). The appellant filed its Jurisdictional Statement in this Court on June 21, 1985. Rule 12.4 of the Rules of this Court permits an appellee to file a cross-appeal by filing a jurisdictional statement complying with Rule 15 of the Rules of this Court not more than 30 days after receipt of the appellant's statement of jurisdiction.

———o———

STATEMENT AS TO THE RESTATED ISSUE RAISED BY APPELLANT

The appellees have chosen to restate the issue raised by the appellant in conformity with Rule 15.1(a) of this Court. (Jurisdictional Statement of Alvin Hemme, et al., p. 2).

The appellant has misstated the holding of the district court (Appellant's Jurisdictional Statement, p. 2) in the following language:

> "The district court held that this transitional rule was a species of retroactive legislation and that it was so arbitrary and capricious as to render it unconstitutional under the Due Process Clause of the Fifth Amendment."

In reality, the district court held (Appellant's Jurisdictional Statement, Appendix A, p. 6a:

> "Accordingly, we hold the tax under Section 2010(c) *as applied to this transaction* is so arbitrary and capricious as to render it unconstitutional." (Emphasis added.)

An additional misstatement made by the appellant appears in footnote 7 on page 9 of its Jurisdictional Statement:

> "Appellees' statutory argument had been squarely rejected in *Estate of Renick v. United States,* 687 F.2d 371 (Ct. Cl. 1982), and *the court below did not consider it.*" (Emphasis added.)

The district court specifically referred to the *Renick* case four times and quoted from it once. (Appellant's Jurisdictional Statement, Appendix A, pp. 5a-6a). The district court decided the case on the constitutional issue and had no need to decide the issue of statutory construction. The

issue of statutory interpretation was raised and was thoroughly briefed and argued before the district court.

Appellants cite *United States v. Darusmont*, 449 U.S. 292 (1981), an income tax case, in support of its request for summary reversal. Appellees submit that the questions raised herein are of such nature as to suggest full briefing and argument of this case.

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THE QUESTIONS ARE SUBSTANTIAL

Despite the fact that the district court limited its holding to the facts of this case (Appellants' Jurisdictional Statement, Appendix A, p. 6a) the constitutional issue decided is a substantial one.

The constitutional question is substantial despite the fact that the greatest possible extension of this case is only to those persons who made gifts between September 9, 1976 and October 3, 1976, both dates inclusive, (a period of 24 days) who filed their gift tax returns before October 4, 1970 and elected thereon to use a part or all of their $30,000 specific exemption under Section 2521 against such gifts, then had the misfortune to die within three years of the date those gifts were made, and who left estates which were taxable and had those gifts (or transfers) included in their estates as transfers in contemplation of death. The fact that all of those persons would have died by October 3, 1979, and the last of the federal estate tax returns on their estates would have been due on July 3, 1980, with the Statute of Limitations (Section 6501) on those returns expiring on July 4, 1983, over two years ago, does not

minimize the substantiality of the question. No other reported case contains these facts. Only one other case (involving a gift made on December 31, 1976) *Estate of Renick v. United States*, 687 F.2d 371 has been reported, but its facts are distinguishable from the instant case.

The fact that the amount of estate tax involved in this case is only $6,000 does not minimize the constitutional issue. The appellant admits that "the statute involved is a relatively obscure transitional rule." (Appellant's Jurisdictional Statement, p. 10). The reasoning of the district court is very restricted. In fact, it is limited to the facts of this case. It would not disable Congress from enacting amendments to income tax laws containing retroactive features, as the appellant says, for the district court specifically noted that this court has held that Congress may provide for the retroactive operation of income tax legislation (Appellant's Jurisdictional Statement, Appendix A, p. 3a). Likewise the reasoning of the district court would not disable Congress from enacting amendments to estate and gift tax laws containing retroactive features, as the appellant asserts, for the district court recognized that "(t)here have been cases where a retrospective tax on an estate and gifts has been upheld." (citing cases.) (Appellant's Jurisdictional Statement, Appendix A, p. 5a). The district court then distinguished the *Milliken v. United States*, 283 U.S. 15, and *Estate of Renick v. United States*, 687 F.2d 371, from the instant case.

The appellant is "crying wolf" when he says "The decision below thus threatens to affect adversely the administration of the revenue by circumscribing what had heretofore been regarded as the unquestioned prerogative of Congress in enacting tax statutes." (Appellant's

Jurisdictional Statement, p. 10) The judgment of the district court states quite the contrary. Nevertheless, because the Constitutional issue is an important one the court is asked to note jurisdiction.

1. The district court properly held that the transitional rule of Section 2010(c) was so arbitrary and capricious as to violate the prohibition against depriving any person of property without due process of law contained in the Due Process Clause of the Fifth Amendment.

The appellant cleverly argues that by reason of the enactment of the Tax Reform Act of 1976 the decedent's estate would have saved $655.16, and, therefore, the decedent's estate had not been deprived of property. (Appellant's Jurisdictional Statement, pp. 10-11). The Tax Reform Act indeed reduced the decedent's estate tax by $655.16, but the appellant ignores the fact that the effect of the Tax Reform Act was to tax the same property of the decedent two times. The decedent died on November 9, 1978. His death occurred within three years of the date on which he made the above gifts. An estate tax return was timely filed and the gifts made on September 28, 1976 were reported and included as transfers made in contemplation of death under Section 2035. In addition, pursuant to Section 2010(c), which was signed into law on October 4, 1976, an adjustment of $6,000. (20% of the $30,000 specific exemption) was made reducing the amount of the unified credit allowable on the decedent's estate tax return. As a result of this adjustment, the decedent's estate received only $28,000 unified credit ($34,000 minus $6,000) rather than the full $34,000 unified credit applicable to estates of decedents dying during 1978. The effect of the Appellant's interpretation of these two sections of the Internal

Revenue Code is to tax the same property (or transfer) twice or to double the estate tax on that property (or transfer). The appellant tries to cover up the fact of double taxation by arguing that Congress did not extend to the Hirschi estate the "double tax benefit" which it gave to other persons who claimed the specific exemption on gifts made before September 9, 1976. (Appellant's Jurisdictional Statement, p. 11). No doubt what the appellant refers to is 1) the estate tax reduction of $655.16 resulting from the changes in the Tax Reform Act of 1976 over the prior law and 2) the granting to pre-September 9, 1976 donors (and to post-September 9, 1976 donors who did not elect to use their specific exemption) an additional $6,000 unified credit on death, but the appellant does not explain. As a matter of fact, Congress did not give a "double tax benefit" to all such persons, because they were still subject to the "transfers in contemplation of death" rule of Section 2035. Section 2010(c) enacted on October 4, 1976 effectively deprived the appellees of property by taxing that property twice, once under Section 2010(c) and again under Section 2035, resulting in double taxation of the same property. It is interesting to note that if the decedent had died before January 1, 1977 (the effective date of the Tax Reform Act of 1976) his estate tax would have been $6,000 less than the appellant claims, because pre-1977 law then would have applied to his estate.

Appellant cites *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970) an income tax case in support of its argument. Appellees do not disagree with the holding of that case as it applies to amendments and income tax laws, but, as stated above, here we are dealing with amendments to estate tax laws.

2. The application of Section 2010(c) to the appellees constitutes retroactive legislation, and the district court was correct in examining it in light of the Due Process Clause. The decedent made his gifts on September 28, 1976. Two days later (September 30, 1976) he timely filed his gift tax return reporting those gifts and electing to use the $30,000 specific exemption against them. In 1976, Section 6075(a) required the filing of decedent's federal gift tax return on or before the 15th day of the second month following the end of the calendar quarter in which the gifts were made. Since decedent's gifts were made during the July-September quarter, his gift tax return was due on or before November 15, 1976.

The district court held (Appellant's Jurisdictional Statement, Appendix A, p. 6a):

> "In the present case Mr. Hirschi had no such choice. His gift was made and his gift tax returns filed before the statute's enactment. Although the decedent taxpayer, like the taxpayer in *Untermeyer*[3], may have had notice of the proposed tax he should not be required to guess on what the legislative outcome would be."

The President signed the Tax Reform Act of 1976 into law six days after the decedent made the gifts and four days after he filed his gift tax returns.

The appellant has cited *United States v. Jacobs*, 306 U.S. 363, 367 (1939) and *United States v. Manufacturers National Bank*, 363 U.S. 194, 200 (1960), with the former case holding that an estate tax provision which is effective at the date of death "does not operate retroactively merely because some of the facts or conditions upon which

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[3]*Untermeyer v. Anderson*, 276 U.S. 440 (1928)

its application depends came into being prior to the enactment of the tax." (Appellant's Jurisdictional Statement, p. 11).

The *Jacobs* and *Manufacturers National Bank* cases are quite unlike the instant case. In *Jacobs,* the property in question was acquired by the decedent in 1909, and the estate tax was enacted seven years later (1916). The decedent died on June 17, 1924, thus giving the decedent ample time (8 years after the estate tax became law, but only 15 days after the estate tax was amended) to structure his estate so as to minimize estate taxes regarding the property in question. Nevertheless, *Jacobs* had had an opportunity to change his situation. Such was not the case here. In the instant case, the decedent made the gifts. Two days later he filed his gift tax return. Four days after that the president signed the Tax Reform Act of 1976 into law. The *Jacobs* case is distinguishable and is not applicable here.

In *Manufacturers National Bank* the decedent divested himself of ownership of a life insurance policy in 1936, but he continued to pay the premiums thereon. In 1942 the Revenue Act of 1942 made the payment of premiums a test for including the policy proceeds in his estate. The deceased died in 1954, which was 12 years after the 1942 Revenue Act was passed, thus giving him 12 years in which to stop paying premiums on the policy. Charles Hirschi did not have 8 years or even 15 days (as in *Jacobs*) or 12 years (as in *Manufacturers National Bank*) in which to change his situation. The *Manufacturers National Bank* case is in no way analogous to the case at bar on the issue of the constitutionality of a retroactive amendment and is not applicable here.

The appellant's argument that "the estate tax has never been limited to property owned by the decedent at the time of his death, but has always, in its original form and as variously amended, included in the decedent's gross estate property transferred or otherwise acted upon by him at some earlier time" (Appellant's Jurisdictional Statement, pp. 12-13), is really immaterial here. What the appellees object to here is the fact that the decedent in this case had made a gift of his property in reliance on the law which was in effect on September 28 and 30, 1976, and then the law was changed on October 4, 1976 and completely altered the tax effect on such gifts. This is what the district court described as "arbitrary and capricious". (Appellant's Jurisdictional Statement, Appendix A, p. 6a.) Because Section 2010(c) is "arbitrary and capricious" as applied to the facts of this case, it violates the Due Process Clause of the Fifth Amendment.

3. The appellant cites *Milliken v. United States*, 283 U.S. 15, 21 (1931) as rejecting the proposition that retroactivity in an estate tax statute necessarily invalidates it. (Appellant's Jurisdictional Statement, p. 13).

The district court examined the *Milliken* case and said (Appellant's Jurisdictional Statement, Appendix A, p. 5a):

> "There have been cases however where a retrospective tax on an estate and gifts has been upheld . . . (citing *Milliken* and *Renick*) . . . We feel these cases are distinguishable from the case at bar.
>
> "In *Milliken* the court held the Revenue Act of 1918 applicable to a gift made in 1918 for estate tax purposes. This holding was based on a similarity

> of the two statutes. The court found the only difference between the statutes was one of tax rate. The court further noted that the decedent could have anticipated the tax."

The *Milliken* court distinguished cases like *Untermeyer v. Anderson,* 276 U.S. 440 (1928) and *Nicholas v. Coolidge,* 247 U.S. 531 (1927), where "the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which made the occasion of the tax." *Milliken* at p. 21.

In the instant case, it was not foreseeable that the decedent's estate would suffer a reduction of $6,000 in the unified credit (the unified credit did not exist on September 28, 1976 or on September 30, 1976) nor would have to pay an additional $6,000 estate tax on the same gifts if he died within three years of making his gift. There was no similar provision for 1) a unified credit or 2) a reduction in unified credit in the Internal Revenue Code prior to the enactment of Section 2010(c) on October 4, 1976. Furthermore a unified estate and gift taxing system did not exist before October 4, 1976.

This lack of notice, which violates due process and taxes a transfer which was formerly exempt, also distinguishes those cases [like *Brushaber v. Union Pacific R. R. Co.,* 240 U. S. 1, 20 (1916)] upholding retroactive income taxes. Income taxes, while changing, are certainly foreseeable. As mentioned above, Section 2010(c) is not only new. It is unique. It creates a unified credit, which previously did not exist. It requires a reduction in the unified credit allowed under the statute as a result of a gift. Then Section 2035 (a) requires the inclusion

of the same property which constituted the transfer (gift) without making any adjustment therefor. It is a burden which could not have been understood or foreseen at the time of the transfer. It is a transfer which might not have been made, or a transfer for which the decedent might not have claimed a specific exemption, if it could have been foreseen.

The appellant characterizes Section 2010(c) as a "transitional rule designed to prevent taxpayers from manipulating the timing of their gifts so as to derive a double tax benefit from the shift to a 'unified'-credit estate-and-gift-tax regime" (Appellant's Jurisdictional Statement, p. 15). But where is that "double tax benefit"? Is it the $30,000 specific exemption under Section 2010(c) (which really results in a gift tax savings of $2,250) and the reduction in estate taxes of $655.16, the latter of which is asserted on page 11 of the Appellant's Jurisdictional Statement? Perhaps it is, but on the other hand, the appellant completely ignores the penalty of double taxation to which the decedent's estate is subjected by reason of 1) the $6,000 reduction in the unified credit under Section 2010(c) and 2) the inclusion of the decedent's same $30,000 gifts in his estate under Section 2035. The decedent certainly could not have anticipated the former when he made his gifts and filed his gift tax return.

The arguments of the appellant regarding the dates of the meetings of the House Ways and Means Committee and the Conference Committee are immaterial here. The Tax Reform Act of 1976 did not become law until October 4, 1976 when the President signed it.

The Appellant cites the *Darusmont* case in support of the application of the transitional rule to the appellees. Again it should be noted that *Darusmont* dealt with a retroactive amendment to the income tax law and not to the estate tax law.

4. As his final point the appellant argues ". . . the decedent in this case 'had ample advance notice' . . . of the proposed change in the tax laws," citing *United States v. Darusmont,* 449 U.S. 292 at 299, the House Ways and Means Committee action on August 6, 1976, the Conference Committee action on September 8, 1976, and the passage of the bill by Congress on September 16, 1976—all occurring before the decedent made his gifts on September 28, 1976. But the appellant cites as authority, *Darusmont* which involved an amendment to the income tax laws. The appellant ignores the fact that the bill was not signed by the President until October 4, 1976, an act constitutionally required before the bill became law. U.S. Constitution, Article I, Section 7.

The appellant justifies the retroactively of Section 2010(c) to September 8, 1976 in order "to prevent a 'rush to the door'". (Appellant's Jurisdictional Statement, p. 16). He recognizes, as Congress apparently recognized, that individuals might make gifts in anticipation of the signing of the new tax bill. What both the appellant and Congress failed to recognize is that individuals are making gifts all of the time—some motivated by tax laws and some not so motivated. What both of them also failed to recognize is that in 1976 gift tax returns had to be filed quarterly and that such tax returns had to be filed at the end of the then current quarter under the tax law then in effect. Section 6075(a). What both of

them also failed to recognize is that in those July-September, 1976 returns filed before the new tax bill was signed, taxpayers, such as the decedent, would be making elections—under the old law and not the new law—because the new law was not then in effect. Under these circumstances, it was harsh, oppressive, arbitrary and capricious for Congress to make Section 2010(c) retroactive to September 8, 1976.

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STATEMENT AS TO SECOND ISSUE RAISED BY APPELLEES

The second issue raised by the appellees is likewise substantial. Whereas Section 2010(c) uses the word "gifts", neither old Section 2035 nor new Section 2035(a) uses the word "gifts" other than in the titles of the latter, i.e., in Section 2035(a). Rather, each of them [old Section 2035 and new Section 2035(a)] in the bodies of the statutes uses the word "transfer". This point was completely overlooked by the Court in *Estate of Renick*, 687 F. 2d 371.

Does this mean that the gifts (transfers) made by the appellees' decedent, Charles W. Hirschi, on September 28, 1976, by reason of their inclusion in the decedent's gross estate for estate tax purposes as gifts (really, transfers) in contemplation of death, transforms such gifts into transfers and, therefore, takes them out of the meaning of Section 2010 (c)? The appellees submit that this is indeed the case here. The plain wording of Section 2035(a) does not call Charles W. Hirschi's September 28,

1976 gifts "gifts". It calls them "transfers." Even the *Renick* court (supra, at p. 376) says:

> " . . . The language of revenue statutes should be interpreted, if possible, in accordance with *its ordinary and everyday meaning*" and cases there cited. (Emphasis added)

and again (at p. 376)

> " . . . we cannot sacrifice the '*plain, obvious and rational meaning*' of the statute even for 'the exigency of a hard case," and cases there cited. (Emphasis added)

If we read Section 2010(c) as including only "gifts," then it does not include a "transfer" under Section 2035 (a), and the specific exemption of $34,000 should not have been reduced by 20 per cent in this case.

Isn't a "transfer" a "gift"? Yes it is, in all candor, but it is a particular kind of gift. It is a transfer in contemplation of death. Only "transfers" under old Section 2035 and new Section 2035(a) are transfers in contemplation of death. Not every gift is a transfer in contemplation of death, consequently, not every "gift" is a "transfer". Unfortunately, the bar has become rather careless in its use of tax terms and has confused the concept of "*gifts* in contemplation of death" with "*transfers* in contemplation of death," the latter of which is most in keeping with the wording used in both old Section 2035 and new Section 2035(a). The Stipulation of Facts, p. 3 (para. 9) erroneously describes Charles W. Hirschi's "transfers made in contemplation of death" as "gifts made in contemplation of death." The statute does not use the words "*gift* in contemplation of death". It uses the words "*transfer* in contemplation of death." The

transfer in contemplation of death, [under Section 2035 (a)] therefore, is a particular category not specifically mentioned or included in Section 2010(c). Under the *Renick* case, at p. 376,

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out."

The *Renick* case goes on to say in most emphatic terms, at page 376,

> "In case of doubt they (statutes) are construed most strongly against the government, and in favor of the citizen." And cases there cited.

Under this interpretation, Section 2010(c) does not include "*transfers* in contemplation of death" within the meaning of the word "*gifts*" as used therein, therefore, the reduction should not have been applied to the September 28, 1976 gifts of the appellees' decedent, Charles W. Hirschi.

The word "gifts" is used two times in Section 2010(c), once in the title and once in the body of the statute itself. The title to the section, standing by itself, is *meaningless.* Under these circumstances this word might be disregarded. On the other hand, the word "gifts" also appears in the body of Section 2010(c), where a sentence complete with subject and verb appears and thus gives the word "gifts" meaning. The use of the word "gifts" in both the title, where it has no meaning and the body of the statute, where it has meaning, seems to underscore the fact that the word "gifts" is used for the purpose of including only "gifts" and not "transfers".

On the other hand, old Section 2035 did not use the word "gift". Instead, it used the words "transfer," "transferred," "relinquished," "exercised," "released," "transfer," "relinquish," "exercise," "release," "transfers," "transfer," and "relinquishment" but *nowhere* does the word "gift" appear. As a consequence, so far as old Section 2035 was concerned, that statute referred only to "transfers" and the other words listed above and not to "gifts".

New Section 2035 uses the word "gifts" or "gift" five times, the word "transfer" once and the word "sale" once. Does this change the meaning of the word "transfers" as used therein? The appellees think not. The placement of the word "gifts" in new Section 2035 is significant. The title to Section 2035 contains the word "gifts". The appellees submit that this word is used in a general and rather loose way to conserve the use of language and not to be in anyway specific as to what is covered by the section. Furthermore, the title, appearing alone, is meaningless, just as it was in the case of old Section 2035. It should also be noted that the word "gifts" appears only once in the title to sub-section (a) and three times in sub-section (b). The appellees believe that this supports their contention that the word "gifts" in the title to Section 2035 was used generally and loosely and not in any specific way.

The word "gifts" appears again in sub-section (a) but this time *only* in the title to the sub-section. Again, standing alone, the title is *meaningless*. The appellees contend that its use in this instance is also rather loose, because it is contrary to the content of sub-section (a), which uses *only* the word "transfer"—which has great significance and meaning and is *limited* to *transfers in contemplation of*

death. The word "transfer" appears in the body of Section 2035(a), where a sentence complete with subject and verb appears and thus gives the word "transfer" substantial meaning and limits it to "transfers in contemplation of death." The appellees assert that the use of the word "gifts" in the title of sub-section(a) was really a mistake and that the word "transfers" controls the meaning of the sub-section and overrules the use of the word "gifts" in the title to sub-section(a).

Sub-section (b) uses the word "sale" one time and the word "gift" three times, but sub-section (b) is an exclusionary clause and limits and reduces what would have been included under new Section 2035. It further explains the use of the word "gifts" in the title to Section 2035.

The appellees argue that the use of the word "gifts" in Section 2010(c) does not include "transfers" under new Section 2035(a), that the word "transfers" under new Section 2035(a) refers to "transfers in contemplation of death" and that such transfers are not "gifts" under Section 2010(c) and will not cause a reduction in the specific exemption under Section 2010(c).

It should also be noted that Schedule G of Form 706 filed in the Estate of Charles W. Hirschi (Stip., Appendix C, p. 10) is entitled "*Transfers* During Decedent's Life." (Emphasis added.) Paragraph A thereof refers to: "Transfers by decedent after December 31, 1976, and within 3 years of death unless excepted under Section 2035(b)"; but paragraph B thereof refers to: "Other *transfers*". This is where the decedent's transfers were reported. The Revenue Service has drawn the same distinction as the appellees draw herein.

For all the reasons stated above, the Court should construe the word "gifts" in Section 2010(c) as excluding

(or not including, as the case may be,) "transfers" under Section 2035(a).

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CONCLUSION

Probable jurisdiction should be noted, and for the reasons stated above the judgment of the district court should be affirmed.

Respectfully submitted,

DONALD C. RIKLI
Attorney for Appellees

July, 1985

APPENDIX A

United States Constitution, Article I, Section 7 provides in part:

> " . . . Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . ."

Internal Revenue Code of 1954 [26 U.S.C. (1970 ed.)] Section 2521 (now repealed), SPECIFIC EXEMPTION.

> "In computing taxable gifts for the calendar year, there shall be allowed [as] a deduction in the case of a citizen or resident an exemption of $30,000, less the aggregate of the amounts claimed and allowed as specific exemption in the computation of gift taxes for the calendar year 1932 and all calendar years intervening between that calendar year and the calendar year for which the tax is being computed under the laws applicable to such years."

Internal Revenue Code of 1954 [26 U.S.C. (1970 ed.)], Section 2035 (before amendment by the Tax Reform Act of 1976), TRANSACTION IN CONTEMPLATION OF DEATH.

> "(a) GENERAL RULE.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.
>
> "(b) APPLICATION OF GENERAL RULE.—If the decedent within a period of 3 years ending with

the date of his death (except in case of a bona fide sale for and adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise or release made before such 3-year period shall be treated as having been made in contemplation of death."

Internal Revenue Code of 1954 [26 U.S.C., (1976 ed.)] Section 2035, (after amendment by the Tax Reform Act of 1976) ADJUSTMENTS FOR GIFTS MADE WITHIN 3 YEARS OF DECEDENT'S DEATH.

"(a) INCLUSION OF GIFTS MADE BY DECEDENT.—Except as provided in subsection (b), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of the decedent's death.

"(b) EXCEPTIONS.—Subsection (a) shall not apply to—

"(1) any bona fide sale for an adequate and full consideration in money or money's worth, and

"(2) any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to $3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a).

"(c) INCLUSION OF GIFT TAX ON CERTAIN GIFTS MADE DURING 3 YEARS BEFORE DECEDENTS DEATH.—The amount of the gross estate (determined without regard to this subsection) shall be increased by the amount of any tax paid under chap-

ter 12 by the decedent or his estate on any gift made by the decedent or his spouse after December 31, 1976, and during the 3-year period ending on the date of the decedent's death."

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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN HEMME, ET AL., CROSS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS CROSS-APPEAL

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BEST AVAILABLE COPY

QUESTION PRESENTED

As stated by cross-appellants, the question sought to be presented by their cross-appeal is whether the word "gifts" as used in Section 2010(c) of the Internal Revenue Code of 1954 (26 U.S.C.) includes a "transfer" as used in Section 2035.

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The Acting Solicitor General, on behalf of the United States, respectfully moves the Court, pursuant to Rule 16.1(a) and (d) of this Court's Rules, to dismiss the cross-appeal in this case.

Appellees in *United States* v. *Hemme*, No. 84-1944, have filed a jurisdictional statement pursuant to Rule 12.4, seeking to bring a cross-appeal from the judgment of the district court in their favor, and to present to this Court a statutory issue not ruled upon by that court.

1. The decisions of this Court make it clear that a party may not appeal from a judgment in his favor. *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939); *Lindheimer* v. *Illinois Tel. Co.*, 292 U.S. 151, 176 (1934). The judgment of the district court in this case was "in favor of plaintiffs [*i.e.*, cross-appellants] and against defendants." 84-1944 J.S. App. 7a. Indeed, cross-appellants do not question that fact, since they conclude

their jurisdictional statement (85-132 J.S. 19) with the plea that "the judgment of the district court should be affirmed." Their cross-appeal should therefore be dismissed for want of jurisdiction.

2. Appellees seek to present to the Court by their cross-appeal a statutory issue (85-132 J.S. 14-19) unrelated to the statutory issue presented to, but not ruled upon by, the district court. See 84-1944 J.S. 8 n. 7. Absent exceptional circumstances, this Court will not consider issues neither raised nor decided below. See, e.g., *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). There is, in any event, no merit to the argument. Appellees now contend that since Section 2035(a), both before and after 1976, relates to *transfers* while Section 2010(c) reduces the unified credit if a specific exemption has been claimed for *gifts* made by the decedent, the latter Section does not relate to transactions covered by the former. It is true that Section 2035(a), prior to the 1976 Act, referred to "a transfer * * * in contemplation of his death," and after 1976 to "a transfer" within three years of decedent's death. But a transfer for an adequate and full consideration—*i.e.*, a non-gift transfer—was excluded from that provision by Section 2035(a) prior to the 1976 Act, and by Section 2035(b)(1) thereafter. In other words, Section 2035(a) referred, and refers, to gifts in contemplation of death, or made within three years of death, as this Court has regularly recognized. See *United States* v. *Wells*, 283 U.S. 102, 116-117 (1931); *Allen* v. *Trust Co.*, 326 U.S. 630, 635-637 (1946). More recently, the Court has had occasion to point out that the gift tax (and, necessarily, the specific exemption therefrom) is imposed upon "any gratuitous transfer of any interest in property." *Dickman* v. *Commissioner*, No. 82-1041 (Feb. 22, 1984), slip op. 3. The difference in meaning that appellees seek to draw is non-existent.

It is therefore respectfully submitted that appellees' cross-appeal should be dismissed.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985